

LAFARGE CONCRETE (MALAYSIA) SDN BHD

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v.

GOLD-TREND BUILDERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

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MARY LIM JC

[SUIT NO: D3-28-610-2008]

6 FEBRUARY 2009

COMPANY LAW: *Winding up - Petition - Seeking to wind up respondent company - Non payment of debt - Whether there was a reasonable explanation for non-payment - Whether respondent a solvent company able to meet terms of settlement agreement - Whether conditions under s. 218(1)(e) and (i) read together with (2)(a) met*

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The petitioner presented a petition (encl. 1) seeking to wind up the respondent company for non-payment of a principal sum currently standing at RM29,861.87. The petition was premised on s. 218(1)(e) and (i) read together with (2)(a). The petition was however resisted and the debt disputed by the respondents on the grounds that (i) the amount claimed was erroneous; (ii) s. 218 notice was premature since there had been no termination of the settlement agreement; (iii) the petitioner did not take into account payments made and (iv) the respondent was solvent. The petitioner submitted that failure to pay as agreed in the settlement agreement was a breach rendering the agreement repudiated, thus the plaintiff had a right to file this petition.

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Held (dismissing encl. 1 with costs):

- (1) From the cause papers and submissions made by both parties, the parties had resolved that the outstanding account of the respondent arising from 11 invoices be settled by eight monthly installments. Other than a provision that interest charges would continue until the outstanding sums were fully paid, there was no mention in the settlement agreement of the consequences in the event of a default, be it for payment or timely payment. This was significant since the absence of a default clause posed concerns as to whether the non-payment of any installment rendered the total sum as due and payable. (para 7)

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- A (2) Before the court exercises its discretion, it needs to be
satisfied that the notice and thus the petition relate to a
specified debt whose existence could not be seriously
questioned. The debt must also be presently due. Herein,
B looking at how the parties have conducted themselves in
relation to the settlement agreement, this court was doubtful
of an affirmative answer. Suffice to say that for the purposes
of this petition, having regard to the factors just outlined, the
court was satisfied that there was a reasonable explanation for
C the non-payment. It would therefore not be just and equitable
to make the order sought by the petitioner. (paras 12 & 13)
- (3) The respondent was a solvent company. The financial
statement of the respondent showed incremental sums in the
account of the respondent revealing the respondent as an
D ongoing concern able to settle the installments as agreed.
Further, although the sum outstanding was above the
statutory limit, the evidence presented showed that there was
a settlement arrangement between the parties which continued
even after issue of the statutory demand notice. The
E respondent was solvent and was able to meet the terms of
the settlement agreement, though late. Any delay in payment
appeared to be covered by the imposition of interest as
apparent from the related correspondence. The conditions
under s. 218(1)(e) and (i) read together with (2)(a) were not
F met. (paras 14 & 15)

Case(s) referred to:

Malaysia Air Charter Co Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000]
4 CLJ 437 FC (*refd*)

- G *United Malayan Banking Corporation Bhd v. Richland Trade &
Development Sdn Bhd* [2000] 1 CLJ 57 FC (*refd*)

Legislation referred to:

Companies Act 1965, s. 218(1)(e), (i), (2)(a)

For the petitioner - YP Hiew; M/s Shui-Tai

- H *For the respondent - Lincoln Hoo; M/s Lin Coln & Co*

Reported by Suhainah Wahiduddin

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JUDGMENT**A****Mary Lim JC:**

[1] The petitioner has presented a petition (encl. 1) supported by a verifying affidavit affirmed on 3 September 2008 (encl. 2) where the petitioner is seeking to wind-up the respondent company for non-payment of a principal sum currently standing at RM29,861.87 after a corrective affidavit was filed by the petitioner on 17 October 2008 (encl. 5).

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[2] At the time of the issuance of the statutory demand on 8 April 2008 that sum stood at RM36,574.58 (encl. 1: exh. P3 - p. 29).

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[3] This petition is premised on s. 218(1)(e) and (i) Companies Act 1965 read together with (2)(a), that is:

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218 (1): The Court may order the winding up if:

(e) the company is unable to pay its debts;

(i) the Court is of the opinion that it is just and equitable that the company be wound up;

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218 (2): A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

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[4] The petition is resisted and the debt disputed. The grounds identified by learned counsel for the respondents and found in encl. 11 are - the amount claimed is erroneous; the s. 218 notice is premature since there has been no termination of the settlement agreement; the petitioner did not take into account payments made; and the respondent is solvent.

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[5] The petitioner has filed an affidavit in response disputing those issues raised - encl. 14.

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- A [6] The discretion whether to make an order for winding-up lies with the court. Having regard to the impact and effect of a winding-up, a strong case has to be made out before the court will grant such a petition.
- B [7] From the cause papers and the submissions made by both learned counsel it is clear that the parties had resolved that the outstanding account of the respondent arising from 11 invoices be settled by eight monthly installments. Other than a provision that interest charges will continue until the outstanding sums are fully paid, there is no mention in the settlement agreement of the consequences in the event of a default, be it for payment or timely payment. This is significant since the absence of a default clause poses concerns as to whether the non-payment of any installment renders the total sum as due and payable.
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- D [8] The respondent made only three installments before the petition was presented. All three payments do not appear to have been made timely. In fact, the 3rd installment was made after issuance of the notice necessitating a corrective affidavit to be filed - encl. 5 earlier mentioned. Despite that the payments were accepted by the petitioner.
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- [9] It is also interesting to note that when the petitioner sought settlement of the outstanding account it was only for the outstanding installment - see petitioner's letter dated 18 December 2007 titled "1st Default Reminder - Installment On Overdue Debt" (exh. P2 - p. 26).
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- G [10] Much of the submissions has been on whether s. 218(2)(a) ought to be given a literal or liberal interpretation. If the rule is one of literal interpretation then the sum stipulated in the demand notice has to be precise. Whereas a liberal interpretation allows for inaccuracies subject to the undisputed existence of a debt of a sum of more than RM500 as is required under that section.
- H [11] That issue has however been long resolved by the Federal Court in *Malaysia Air Charter Co Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437. The Federal Court adopted a liberal interpretation. So long as the sum due exceeded RM500 and that sum remained unpaid after a demand had been made without any reasonable explanation to the satisfaction of the court there was neglect to pay such sum within the meaning of s. 218(2)(a). A
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winding-up petition may then be entertained. The notice is only a warning that if after three weeks an outstanding debt is not paid, a winding-up petition would follow - see *United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 57 FC.

[12] However that does not settle the matter. Before the court exercises its discretion, it needs to be satisfied that the notice and thus the petition relate to a specified debt whose existence cannot be seriously questioned. The debt must also be presently due. Having highlighted the facts, specifically the settlement agreement and how the parties have conducted themselves in relation to it, this court is doubtful of an affirmative answer.

[13] Learned counsel for the petitioner submitted that failure to pay as agreed in the settlement agreement is a breach rendering the agreement repudiated. There is no need to terminate the agreement. The petitioner has then a right to file this petition. Whilst the court is not required in the instant proceedings to decide specifically on this, suffice to say that for the purposes of this petition, having regard to the factors just outlined, the court is satisfied that there is a reasonable explanation for the non-payment. It would therefore not be just and equitable to make the order sought by the petitioner.

[14] This court also finds the respondent is a solvent company. Enclosure 16 contains financial statements of the respondent from June 2008 to December 2008. The statements show incremental sums in the account of the respondent revealing the respondent as an ongoing concern able to settle the installments as agreed.

[15] In this case this court does not find that a strong case to have been made out. Although the sum outstanding is above the statutory limit the evidence presented shows that there was a settlement arrangement between the parties which continues even after issue of the statutory demand notice. The respondent is solvent and is able to meet the terms of the settlement arrangement, though late. Any delay in payment appears to be covered by the imposition of interest as apparent from the related correspondence. The conditions under s. 218(1)(e) and (i) read together with (2)(a) are not met.

[16] Enclosure 1 is therefore dismissed with costs.